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In the

Supreme Court of the United States

OCTOBER TERM, 1984

Delbert Paul Hoskins ..... *Petitioner*

V.

United States of America ..... *Respondent*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Where Petitioner's codefendant at trial entered incriminating narrative pleas at an arraignment before the jury but never testified, was Petitioner's Sixth Amendment right to confront his accusers violated by the trial court's refusal to grant a severance?

LIST OF INVOLVED PARTIES

In addition to the Petitioner three others were tried in the proceedings below. The codefendants were Mr. Robert Bode, Mr. John Russell Webster, Jr., and Mr. John Caperton.

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REFERENCE TO THE OFFICIAL REPORT OF THE OPINION BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is reported at 734 F.2d 1048.

STATEMENT OF JURISDICTIONAL GROUNDS

The opinion of the Fifth Circuit in this matter was filed on June 11, 1984. A Petition for Rehearing En Banc was filed. The Order denying the Petition for Rehearing En Banc was filed on July 18, 1984. A Writ of Certiorari is sought from this Court pursuant to 28 U.S.C. Sec. 1254 (1).

STATEMENT OF INVOLVED CONSTITUTIONAL PROVISION AND STATUTORY PROVISION

> Amendment Six of the United States Constitution states— In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Rule Fourteen of the Federal Rules of Criminal Procedure States—

> "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such a joinder for trial together, the Court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the Court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial."

STATEMENT OF THE CASE

The jurisdictional basis of the United States District Court rested upon 18 U.S.C. Sec. 3231, 21 U.S.C. Sec. 841 (a) (1) (Count One charging Mr. Hoskins), 21 U.S.C. Sec. 846 (Count One charging Mr. Hoskins), 18 U.S.C. Sec. 1952 and 2 (Count Eleven charging Mr. Hoskins and Count Sixteen charging Mr. Hoskins) and 21 U.S.C. Sec. 841 (a) (1) and 18 U.S.C. Sec. 2 (Count Seventeen charging Mr. Hoskins). Appellate jurisdiction of the United States Court of Appeals for the Fifth Circuit rested upon 28 U.S.C. Sec. 1291. Jurisdictional time factors are set forth in F.R. App. P., Rule 4 (b) and were complied with.

The Appellant Delbert Paul Hoskins was charged in a multicount indictment before the United States District Court for the Northern District of Texas, Dallas Division, in *United States of America v. Webster, et al.*, District Court No. CR-3-82-218-R before the Honorable United States District Judge Jerry Buchmeyer. In the original indictment thirty-four defendants were charged. Motions for severance were filed and were denied in part. Defendant Hoskins was ultimately tried with Codefendants Caperton, Webster, and Bode. Jury selection began on January 3, 1983. The jury returned with its verdict on February 21, 1983. Mr. Hoskins was charged in Count One of the indictment with having conspired with his three Codefendants and others from May, 1978, to August 4, 1982 to acquire cocaine in Florida and Georgia and transport it to Dallas, Texas in violation of 21 U.S.C. §846 and §841 (a) (1). The jury convicted Mr. Hoskins of that count and he was sentenced to fifteen years and fined $25,000.00. Count Eleven of the indictment alleged that Mr. Hoskins and Marty Lewis aided and abetted Robert Bode in traveling to Texas with the intent to distribute the proceeds of an unlawful activity to Codefendant McDonald in violation of 18 U.S.C. §§1952 and §2. Mr. Hoskins was convicted of that count and sentenced to consecutive imprisonment of five years and a $10,000.00 fine. Count Sixteen alleged that Mr. Hoskins and Marty Lewis

aided and abetted Codefendant Webster on August 26, 1981, in traveling from Dallas to Atlanta to distribute the proceeds of an unlawful activity and to manage and facilitate an unlawful activity in violation of 18 U.S.C. §§1952, and 2. Mr. Hoskins was convicted of that count and consecutively sentenced to five years and an additional fine of $10,000.00. In Count Seventeen Mr. Hoskins was accused of aiding and abetting codefendant Webster on August 27, 1981 in possessing cocaine with the intent to distribute in violation of 21 U.S.C. §841, and §18 U.S.C. 2. He was convicted of that count and sentenced to a consecutive term of five years and a fine of $25,000.00 with a special parole term of five years.

Mr. Hoskins' Codefendant Webster was arraigned in the presence of the jury and entered narrative pleas. For example, when the government read Count One of the indictment, the conspiracy count in which Mr. Hoskins was also charged, Mr. Webster responded, "As to the conspiracy charged in the indictment, I plead—I don't deny many of the acts but I plead not guilty." (T. 565) In Count Sixteen in which Mr. Hoskins was also charged following the government's reading of that count of the indictment Webster stated, "I don't deny the acts, many of the facts are incorrect and I plead not guilty." (T. 576) On Count Seventeen on which Mr. Hoskins was also charged Webster stated, "I don't deny the act and my plea is not guilty." (T. 577) Mr. Webster never testified. Mr. Hoskins asserts that severance should have been granted in that he was denied his right to cross-examine his accusers as secured by the Sixth Amendment of the United States Constitution.

If there was any doubt in the jury's mind as to what Mr. Webster admitted, that doubt was erased when Webster's attorney indicated to the jury in opening statement that Mr. Webster did not contest many of the facts in the indictment. (T. 610, 611) Following Webster's narrative plea and the statement of his attorney in opening, the three other defense attorneys renewed their motions

for severance. (T. 628, 744-747, 2103 and 3006) These motions were denied.

The three judge panel of the United States Court of Appeals for the Fifth Circuit in the opinion filed on June 11, 1984, did not directly address the confrontation clause argument. The panel addressed the mutually antagonistic defense argument raised by the Defendants but dismissed the confrontation clause argument in a footnote. The panel was apparently satisfied that no confrontation clause violation occurred in that Webster did not mention the names of any of the Codefendants during his narrative pleas. (Panel opinion at 11).

QUESTION PRESENTED FOR REVIEW

Where Petitioner's codefendant at trial entered incriminating narrative pleas at an arraignment before the jury but never testified, was Petitioner's Sixth Amendment right to confront his accusers violated by the trial court's refusal to grant a severance?

ARGUMENT

The Petitioner asserts that the opinion of the Fifth Circuit Court of Appeals has resulted in the interpretation of an important question of Federal law which has not been but should be settled by this court.

Petitioner Delbert Paul Hoskins, was one of four defendants tried before the United States District Court for the Northern District of Texas in a multicount indictment springing from an alleged conspiracy to transport cocaine from Florida to Texas for purposes of distribution. Prior to trial Defendant Hoskins filed a motion for severance on October 18, 1982. The motion was brought pursuant to Rule 14 of the Federal Rules of Criminal Procedure and the Fifth and Sixth Amendments. Mr. Hoskins' motion for severance was ruled on by the Court on November 16, 1982, at which time the Court divided the defendants into two groups and set them for trial. The motion was again denied just prior to trial. (T. 54) Mr. Hoskins was tried with three co-defendants, including John Webster, Jr. Hoskins motion for severance was renewed on a number of occasions during the course of the trial.

Codefendant Webster was arraigned in front of the jury and entered narrative pleas leaving the jury with a clear impression that he admitted most of the facts in the indictment. If there was any doubt in the jury's mind, that doubt was erased when Webster's attorney indicated to the jury in opening statement that Mr. Webster did not contest many of the facts in the indictment. (T. 610, 611) Mr. Webster never testified and, therefore, Mr. Hoskins asserts that he was denied his Sixth Amendment right to confront a witness against him.

In the presence of the jury the court requested that the government attorney read the indictment. (T. 447) Defendant Webster was then arraigned in front of the jury. However, Webster did not limit his remarks to a simple

statement of not guilty or guilty. In a number of the counts he made statements which could only be interpreted as admissions that the government's allegations in the indictment were correct.

Count One stated the existence of a conspiracy from May, 1978, to August, 1982, involving the four defendants on trial and others alleging that the conspiracy involved the acquisition of cocaine in Florida, transportation to Dallas and distribution in Dallas, Texas. Among the overt acts read to the jury in Count One, Mr. Hoskins' name appears twice. The indictment alleged that appellant Hoskins met with Mr. Webster and Martin Lewis in Atlanta, Georgia on August 26, 1981. (T. 560, 561) The indictment also alleged an overt act on July 2, 1982, in a meeting between Mr. Hoskins and Martin Lewis in Ocala, Florida. (T. 563) After the reading of Count One, Webster plead as follows, "As to the conspiracy charged in the indictment, I plead—I don't deny many of the acts but I plead not guilty." (T. 565)

Count Three alleged that defendant Webster in May of 1978 distributed two ounces of cocaine to Gary Purell. (T. 567) In response to that allegation Webster stated, "I do not deny the acts, but I plead not guilty." Those allegations are contained in Count One, the conspiracy count in which Mr. Hoskins is charged, as an overt act. (T. 559)

Count Ten alleged that Webster traveled in interstate commerce with the intent to distribute the proceeds of an unlawful activity and that Martin Lewis and Robert Bode aided and abetted him in violation of 18 U.S.C. §§1952 and 2. In response to the allegation Webster stated, "Your Honor, I do not deny the acts. Many of the facts are incorrect. I'm not guilty." (T. 572)

Count Twelve alleged that on July 31, 1982, defendant Webster traveled in interstate commerce with the intent to distribute the proceeds of an unlawful activity and that Martin Lewis aided and abetted him. In response to the

allegation Webster stated, "Your Honor, I don't deny—I don't deny the acts, merely the facts are incorrect and I'm not guilty." (T. 574)

Count Thirteen of the indictment accused Webster on August 2, 1981, of knowingly and intentionally possessing with intent to distribute a quantity of cocaine and that Lewis aided and abetted him. In response to the reading of that paragraph to the jury Webster stated, "I don't deny most of the acts. The facts are incorrect and I'm not guilty." (T. 574)

Count Fifteen was read to the jury and alleged that on August 7, 1981, defendant Webster distributed cocaine to Danny Stone. In response to the allegation Webster stated, "I don't deny the acts but my plea is not guilty." (T. 575) The allegation contained in Count Fifteen also appears in the conspiracy count as an overt act as follows, "On or about August 7, 1981, John Russell Webster, Jr., defendant, met with Danny Stone and Kenneth Grindelli in Dallas, Texas." (T. 560)

Count Sixteen alleged that Webster traveled in interstate commerce with the intent to distribute the proceeds of an unlawful activity on or about August 26, 1981, and was aided and abetted by petitioner Hoskins and Martin Lewis in violation of 18 U.S.C. §1952 and 2. Webster stated in response to the allegations, "I don't deny the acts, many of the facts are incorrect and I plead not guilty." (T. 576) The substance of that allegation also appears as an overt act in the conspiracy indictment as follows, "On or about August 26, 1981, John Russell Webster, Jr., defendant met with Delbert Hoskins and Martin Elliott Lewis, defendants in Atlanta, Georgia." (T. 560,561)

Count Seventeen was read to the jury and alleged that on August 27, 1981, Webster knowingly possessed with intent to distribute cocaine and that Hoskins and Lewis aided

and abetted him in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2. Webster stated in response to the allegation, "I don't deny the act and my plea is not guilty." (T. 577)

Count Eighteen alleged that Webster on November 13, 1981, distributed four ounces of cocaine to David Marlborough. In response to the allegation Webster stated, "I don't deny the act, Your Honor, but my plea is not guilty." (T. 577, 578) The allegation appears as an overt act in the conspiracy count. (T. 561)

Count Nineteen alleged that Webster knowingly used a communication facility in the commission of a felony on or about December 2, 1981, violating 21 U.S.C. §843(b). In response Webster stated, "I don't deny the act, Your Honor, but the facts are not complete and I am not guilty." (T. 578) That allegation also appears in the conspiracy count. (T. 561)

Count Twenty-One alleged that on December 8, 1981, defendant Webster distributed to Kenneth Grindelli one ounce of cocaine. In response to the allegation Webster's plea was as follows, "It is basically correct, Your Honor, but my plea is not guilty." (T. 579)

Count Twenty-Two alleged that on December 8, 1981, Webster used a telephone to facilitate the commission of a felony by a conversation with Kenneth Grindelli. Webster's plea was as follows, "Your Honor, that is basically correct but my plea is not guilty." (T. 500)

In County Twenty-Seven, the government alleged that on June 8, 1982, codefendant Webster used a telephone to facilitate the conspiracy in Count One by transmitting information to Jerry Moss. Webster plead as follows, "Your Honor, that is basically correct but I plead not guilty." (T. 581) That allegation appears in the conspiracy count. (T. 561)

Count Thirty-Nine alleged that Webster used a telephone to facilitate the conspiracy alleged in Count One and transmitted information to Jerry Moss. Webster plead as follows, "Your Honor, this is basically correct and I plead not guilty." (T. 586)

Count Forty-Nine alleged that Webster possessed eight ounces of cocaine with intent to distribute on August 6, 1982. In response to the allegation Webster stated, "Your Honor, this is basically correct, but I plead not guilty." (T. 588)

The problem created by Webster's narrative incriminating pleas is compounded by the opening statement of his attorney. His attorney stated to the jury, "In almost every count of the indictment, Mr. Webster's plea was; I did some of those acts, some of those acts are correct; basically that's correct; some of it is incorrect; basically I did what the indictment says, but my plea is not guilty." (T. 610) Further, Mr. Webster's attorney stated, "So you must keep in mind throughout this trial as to many of the acts charged in this indictment, as to much of the testimony, Mr. Webster does not contest it." (T. 610) Further, Webster's lawyer stated, "Russ Webster expects for you to find him guilty of a number of counts in the indictment. Were it not for the continuing criminal enterprise count in this indictment, Ladies and Gentlemen, we wouldn't be here today. . . .The evidence is going to show a series of violations of the law by Russell Webster. The evidence is going to show the use, and purchase and sale to others, basically his friends of cocaine. . . .So Russ Webster tells you in his plea that a lot of these acts happened but this conspiracy the way it's charged, I'm not guilty." (T. 617)

Following Webster's narrative plea and the statement of his attorney in opening, the three other defense attorneys renewed their motions for severance. (T. 628 and T. 744-747, T. 2103, T. 3006) The motions for severance were again denied. Webster never testified. (It should be noted

at this point that in order to avoid unnecessary delay in trial the trial court had indicated that an objection made by one defense counsel would inure to the benefit of all defendants.) (T. 652)

In *Pointer v. Texas*, 380 U.S. 400 (1965) the United States Supreme Court stated, "There are few subjects, perhaps upon which federal courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." The primary object of the confrontation clause is to provide personal examination and cross-examination in which the accused has the opportunity to test the recollection and sift the conscience of the witness and to compel him to stand face to face with the jury in order that they may look at him and judge by his demeanor and manner in which he gives his testimony whether he is worthy of belief. *Barber v. Page*, 390 U.S. 719, 721 (1968) and *Mattox v. United States*, 156 U.S. 237 at 242, 243 (1895). See also, *Davis v. Alaska*, 415 U.S. 308 (1974); *Douglas v. Alabama*, 380 U.S. 415 (1965); and *Truman v. Wainwright*, 514 F.2nd 150, 151 (5th Cir. 1975).

The problem created by Webster's narrative arraignment is analogous to the confrontation clause violation created when a government witness testifies against the accused and then asserts his Fifth Amendment privilege on cross-examination. See generally, Anno. 55 ALR Fed. 742. When that problem arises the trial court should grant a motion to strike the witness' direct testimony in whole or in part if the witness' refusal to answer questions deprives the defendant of the right or ability to test the direct testimony. *United States v. Lyons*, 703 F.2nd 815 (5th Cir. 1983); *United States v. Humphrey*, 696 F.2nd 72 (8th Cir. 1982); *United States v. Diecidue*, 603 F.2nd 535 (5th Cir. 1979); and *Fountain v. United States*, 384 F.2nd 624 (5th Cir. 1979). In *United States v. Lyons*, supra, at 819, the Fifth Circuit held that if the witness' refusal to testify on cross-

examination by raising the Fifth Amendment creates "a substantial danger of prejudice by depriving a defendant of the ability to test the truth of the witness' direct testimony" relief is warranted. The court points out that striking the witness' direct testimony is ordinarily appropriate relief but states, "If the direct testimony is especially prejudicial, however, as it may be when a witness bears a special relationship to the defendant, we have held this remedy inadequate. On premise that the jury could not follow the instruction to disregard the witness' testimony, we have then required a mistrial." *United States v. Lyons, supra*, at 819. If the remark is so prejudicial that it is incurable by the court's admonition, mistrial should be granted. *United States v. Lyons, supra. United States v. Irwin*, 661 F.2nd 1063, 1071 (5th Cir. 1981); *United States v. Contreras*, 602 F.2nd 1237, 1241 (5th Cir. 1979); and *United States v. Carrillo*, 565 F.2nd 1323, 1326 (5th Cir. 1978).

The landmark decision of *Bruton v. United States*, 391 U.S. 123 (1968) is also supportive of Mr. Hoskins' position. In *Bruton* the state introduced a codefendant's statement inculpating the petitioner and the codefendant failed to testify. The court held that in that situation the defendant was denied his right to cross-examine the witness in violation of the Sixth Amendment of the United States Constitution. In *Bruton* a witness testified that the codefendant had confessed orally that codefendant and the petitioner had committed the crime. The trial judge instructed the jury not to consider the confession against the petitioner, however, the United States Supreme Court held that because there was a substantial risk that the jury despite the cautionary instruction looked to the incriminating extra judicial statement in determining the petitioner's guilt, the admission of the confession in the joint trial violated petitioner's Sixth Amendment confrontation clause rights. See also, *Hendrix v. Smith*, 639 F.2nd 113 (2nd Cir. 1981) and *Mayes v. Sowders*, 621 F.2nd 850 (6th Cir. 1980).

Similarly in the instant case a codefendant acknowledged the correctness of certain allegations in the indictment which were directed not only toward the codefendant but also defendant Hoskins. The codefendant was unavailable for cross-examination. The same rationale that applied in *Bruton* should also be applied in the instant case where the impact of the live codefendant's statements could be considered even more devastating. The trial Court's failure to grant a mistrial or severance should have been considered reversible error by the Fifth Circuit Court of Appeals.

SUMMARY

For the reasons set forth in the argument, this case is one of imperative public importance involving a question of Federal law which has not been but should be settled by this court, and therefore, the petitioner's request for writ of certiorari should be granted.

APPENDIX

OPINION OF THE FIFTH CIRCUIT COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-1191

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOHN RUSSELL WEBSTER, JR.,
DELBERT PAUL HOSKINS, ROBERT BODE
and JOHN JAY CAPERTON,
Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Texas

(June 11, 1984)

Before JOHNSON, HIGGINBOTHAM, and DAVIS, Circuit Judges.
JOHNSON, Circuit Judge.

In November 1981, a barber in Dallas, Texas named Kenneth Grindele walked into the Dallas United States Attorney's Office and identified himself as a cocaine user and "small time" dealer. Grindele advised federal authorities

that he had been involved in cocaine trafficking with appellant John Russell Webster, that he was indebted to Webster and in fear of his life due to his inability to pay Webster. He explained further that he was aware of other individuals involved in the Dallas cocaine market, and was willing to exchange this information for government protection and immunity from prosecution.[1] The ensuing investigation resulted in what was referred to as the biggest cocaine bust in Dallas history. Appellants John Russell Webster, Delbert Paul Hoskins, John Jay Caperton, and Robert Bode appeal from their convictions resulting from this investigation. Finding no reversible error, we affirm the appellant's convictions.

I. Background and Course of Proceedings.

The evidence presented at trial demonstrated that appellants Webster, Caperton, Hoskins, and Bode were involved extensively in cocaine trafficking. Over the course of about two years, these individuals engaged in numerous cocaine transactions involving large amounts of high-quality cocaine, which would be cut and sold or fronted to cocaine dealers who would distribute the cocaine to individual users. While appellants distributed most of the cocaine in Dallas, Texas, the evidence established that appellants often would travel to Georgia or Florida to obtain high-quality cocaine.

One of appellant Webster's regular dealer-customers was a Dallas barber named Kenneth Grindele. At one time, Grindele purchased as much as two ounces from Webster at $1700 per ounce. Grindele consumed some of the cocaine himself and sold the remainder to individual consumers. In October 1981, Grindele's wife discovered his two ounce supply of cocaine and destroyed it. At the time, Grindele

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[1]Grindele ultimately was granted complete transactional immunity and paid in excess of $21,000 for his information and subsequent testimony.

owed Webster $5000, including $3400 for the cocaine destroyed by his wife. Fearful that he would be harmed by Webster because he could not make any payment, Grindele decided to tell the government what he knew about appellants' activities. As a result of this and other information, DEA and FBI agents cooperated in a joint investigation of Webster and his associates.

In December, Grindele, equipped by law enforcement officers with a body microphone, made two purchases from Webster and four from Danny Stone, another of Webster's customers. In June 1982, a federal magistrate approved a request to conduct electronic surveillance of telephones at the residences of Webster and Stone. Wiretaps were initiated on Webster's telephone on June 4 and continued, pursuant to a court approved extension, to August 1, 1982. As a consequence, the law enforcement officers learned of Websters plans to travel to Florida on July 2 to acquire cocaine.[2]

On the date of Webster's departure from Dallas, agents observed him arrive at the airport in Gainesville, Florida at 6:45 p.m. There he was met by Martin Lewis, a friend involved in the cocaine business, who was driving appellant Hoskin's pickup truck. They drove to a hotel parking lot and remained in the car bent over out of sight for a short period of time. Then, they conversed for about ten minutes, and later Webster checked into the hotel. Meanwhile, Lewis drove to a jai alai arena where he met appellant Hoskins. Lewis and Hoskins remained together from 8:00 p.m. until 11:45 p.m., when Hoskins left the arena. A half hour later, Lewis departed and drove the pickup truck to Hoskins' ranch. On the following day, Webster checked out of the hotel and flew to Miami. He rented a car

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[2]Aware of Webster's inclination to conduct his conversations regarding cocaine purchases from pay telephones at a nearby market, the drug agents stationed themselves at adjacent telephones along the phone bank and overheard Webster's portion of his conversation in which he spoke of his plans to travel to Florida.

and drove it first to a store where he purchased Inositol, a substance commonly used to dilute cocaine. Webster returned to Dallas on July 8.

Webster, Caperton and Hoskins were arrested at their individual residences on August 6, 1982. At the time of arrest, agents, armed with warrants, conducted searches of the Webster and Caperton residences. Inside Webster's home the agents discovered, inter alia, cash and undeposited checks, a triple beam scale, large quantities of cocaine and cocaine paraphernalia. At Caperton's residence, the agents found weapons, packages of cocaine, drug paraphernalia and dilutents. In a garage, the agents located a floor safe, which contained $18,200 in cash, expensive jewelry, and large bags of cocaine.

The original indictment resulting from this investigation named thirty-four defendants in 88 counts. After extensive plea bargaining, the government proceeded to trial on a fifty-count indictment against the four defendant-appellants involved herein. The indictment charged these four individuals with numerous violations of federal narcotics laws.[3] Additionally, appellant Webster only was charged with one count of engaging in a continuing criminal enterprise. *See*, 21 U.S.C. § 848. The trial of the case took over six weeks, involved 52 witnesses, and resulted in a trial transcript exceeding 5000 pages. Appellant Webster was convicted on twenty counts, sentenced to imprisonment for 60 years, fined $150,000, and subjected to a five-year special parole term. However, Webster was not convicted on the continuing criminal enterprise count. In fact, the trial judge declared a mistrial on the continuing criminal enterprise count when the jury was unable to reach a verdict. Appellant Hoskins was convicted on four counts, sentenced to imprisonment for 30 years, fined $70,000, and subjected to a five-year special parole term.

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[3]Specifically, appellants were charged with violations of 21 U.S.C. §§ 841, 843, 846 and 18 U.S.C. § 1952.

Appellant Caperton was convicted on five counts, sentenced to a total of twenty-five years incarceration, fined $30,000 and subjected to a five-year special parole term. Finally, appellant Bode was convicted on three counts, sentenced to imprisonment for six months followed by probation for four and a half years and fined $80,000. All appellants filed a notice of appeal and have raised numerous issues on appeal.

II. Severance

All four appellants contend that the district court erred by refusing to grant their motions for severance. Webster, the alleged kingpin in the cocaine conspiracy and the only appellant charged with a continuing criminal enterprise violation, argues that the district court erred by refusing to sever the continuing criminal enterprise count from the remaining conspiracy and substantive counts. According to Webster, he was compelled to adopt a strategy of defense whereby he admitted having committed some of the acts charged in the conspiracy and substantive counts, in order to effectively maintain that he was not the kingpin in this alleged continuing criminal enterprise. Webster's codefendants argue that their trials should have been severed from Websters since he admitted the factual accuracy of many of the conspiracy and substantive counts in which they were named in his attempt to refute the continuing criminal enterprise count.

This Court has consistently emphasized that "[p]ersons indicted together should ordinarily be tried together." United States v. Romanello, 726 F.2d 173 (5th Cir. 1984). Indeed, rule 8 of the Federal Rules of Criminal Procedure provides for the joinder of multiple offenses and multiple defendants and we have stressed that "rule 8 is to be broadly construed in favor of initial joinder..." United States v. Park, 531 F.2d 754, 761 (5th Cir. 1976), *citing*, Tillman v. United States, 406 F.2d 930, 934 (5th Cir.), *vacated on other*

grounds, 395 U.S. 830 (1969). Nevertheless, rule 14 of the Federal Rules of Criminal Procedure provides an exception to the maxim favoring joinder of multiple offenses and multiple defendants. Rule 14 provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendant which the government intends to introduce in evidence at the trial.

Fed. R. Crim. P. 14.

We have held often that the decision whether to grant a severance of defendants or offenses lies within the broad discretion of the district court and that this Court will not overturn the district court's decision absent an abuse of discretion. *See*, U.S. v. Sheikh, 654 F.2d 1057 (5th Cir. 1981); United States v. Berkowitz, 662 F.2d 1127 (5th Cir. Unit B, 1981); United States v. Crawford, 581 F.2d 489 (5th Cir. 1978); and United States v. Johnson, 478 F.2d 1129 (5th Cir. 1973). In order to establish an abuse of discretion, the defendant must show that he "received an unfair trial and suffered compelling prejudice against which the trial court was unable to afford protection." *See* U.S. v. Berkowitz, 662 F.2d at 1132. With these precepts in mind, we review the appellants contentions.

A. Webster's Motion to Sever Offenses

Webster concedes that the continuing criminal enterprise count was joined properly with the conspiracy and substantive counts under rule 8, since the counts are fac-

tually interrelated and allegedly constitute parts of a common scheme or plan. *See*, Fed. R. Crim. P. 8. He maintains, however, that the trial court erred by refusing to grant a severance of the continuing criminal enterprise count under rule 14. According to Webster, in order to refute the continuing criminal enterprise allegation, he was forced to admit that he was involved with his codefendants in cocaine activities.

At trial, prior to opening statements, the district judge engaged in a somewhat unusual procedure and had each defendant stand and plead to the various counts in the indictment in front of the jury.[4]. Although Webster pled not guilty to all counts, he often made equivocal statements similar to the following: "I don't deny the act Your Honor, but my plea is not guilty." *See*, Record, Vol. XV at 577-78. Thereafter, during opening statements and throughout trial, Webster maintained that although he was involved in numerous cocaine dealings with his codefendants, he was not the kingpin in the alleged continuing criminal enterprise.

Webster's contention that the district court abused its discretion by refusing to sever the continuing criminal enterprise count from the remaining counts must fail, since Webster has failed to demonstrate compelling prejudice. Initially, we note that we simply do not see how joinder of the continuing criminal enterprise count forced Webster to admit his guilt on the conspiracy and substantive counts. Webster certainly could have argued that he did not engage in any of the acts charged in the conspiracy or substantive counts and, at the same time, argue that he was not the head of the continuing criminal enterprise. It is noted that the jury was unable to convict Webster on the continuing criminal enterprise count even though it convicted him on

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[4]The record does not reveal the reason for this unusual procedure and the problems inherent in such a procedure militate against its continued use.

numerous of the conspiracy and substantive counts. This result, however, appears to follow from Webster's voluntary decision not to seriously challenge the conspiracy and substantive counts, but to focus his attack upon the continuing criminal enterprise count. Webster certainly cannot now argue that the jury's verdict reflects prejudice flowing from the joinder of the offenses, since he voluntarily decided to pursue a strategy of attacking only the criminal enterprise count at trial. Finally, we note that Webster was not held to any of his statements in pleading to the counts by the court or the prosecutor, and at no time was Webster's cross examination of witnesses limited because it might have been inconsistent with his earlier unilateral declaration not to challenge certain factual resitations in the indictment. Consequently, the government was required to prove all the elements of each of the twenty-one offenses charged against Webster, and the court was required to instruct the jury on the specific elements of all of the charged offenses. Simply put, we conclude that Webster has failed to demonstrate compelling prejudice resulting in an unfair trial.

B. Webster's Codefendant's Motion for Severance

As noted, Webster's codefendants contend that the trials court should have severed their trials from Webster's so that they could have been tried separately. The incident that underlies the claim for prejudice asserted by Webster's codefendants arose at the outset of the proceedings. As noted previously, the district judge, in the presence of the jury, conducted what was tantamount to a rearraignment and required each defendant to plead to the counts in the indictment. Although Bode, Hoskins, and Caperton entered straightforwad pleas of not guilty, Webster often embellished his responses. According to appellants Bode, Hoskins, and Caperton, Webster's defense was antagonistic to their defenses and the district court should have granted a severance.

When codefendants allege antagonistic defenses as a ground for severance, this Court has applied very specific tests to determine whether the trial was unfair. To compell severance, the defenses must be antagonistic to the point of being irreconcilable and mutually exclusive. *See*, United States v. Berkowitz, 662 F.2d at 1133; United States v. Crawford, 581 F.2d at 491. The defenses must be so antagonistic that the jury, in order to believe the defense of one defendant, must necessarily disbelieve the other defendant's defenses. *Id.* Such is not the case here. The election of Webster not to seriously oppose the proof of his own implication in the conspiracy and substantive counts did not automatically sweep his codefendants into that strategy and create a situation involving mutually exclusive and irreconcilable defenses.[5] *See, c.f.*, United States v. Romanello, 726 F.2d 173 (1984). The fact that Webster may have admitted his involvement in some of the charged conspiracy and substantive counts would not require necessarily the jury to conclude that the other codefendants, who disputed their involvement in the charged counts, were likewise involved. Moreover, it is noted that Webster never directly implicated his codefendants by name in any criminal activity in the process of pleading to the indictment.[6] In sum, ap-

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[5]Indeed, a review of the jury's verdict demonstrates that the jury considered "the independant evidence against each defendant solely upon that defendant's own acts, statements and conduct." *See*, United States v. Perez, 489 F.2d 51, 65 (5th Cir. 1973), *cert. denied*, 417 U.S. 945 (1974). In light of this, it is clear that the jury was able to "keep separate the evidence that [was] relevant to each defendant" and rendered a fair and impartial verdict as to each defendant. *Id.*

[6]Appellants also allege that Webster's statements in front of the jury in pleading to the indictment violated the Supreme Court's holding in Bruton v. United States, 391 U.S. 123 (1968). However, this Court has held consistently that the Bruton rule is not violated unless a codefendant's statement directly alludes to the complaining defendant. *See*, United States v. Heffington, 682 F.2d 1075, 1082-1083 (5th Cir. 1982); U.S. v. Castro, 596 F.2d 674, 676-77 (5th Cir. 1979); United States v. Roach, 590 F.2d 181 (5th Cir. 1979); and United States v. Gravitt, 590 F.2d 123 (5th Cir. 1970). This is true, even if the evidence makes it apparent that the defendant was implicated by some indirect references. United States v. Stewart, 579 F.2d 356 (5th Cir.) (*cert. denied*, 439 U.S. 936 (1978). In the instant case, examination of the record reveals that Webster did not directly allude to any of the complaining defendants in pleading to the indictment.

pellants have failed to demonstrate that the district court's refusal to grant a severance constituted an abuse of discretion resulting in compelling prejudice.

III. Wiretap Order

Appellant Webster contends that the trial court erred by denying his motion to suppress the evidence obtained through wiretap surveillance, since the government allegedly failed to demonstrate that other available means of investigation were unsuccessful. *See*, 18 U.S.C. § 2518 (1)(c).[7] However, a review of the record reveals that this contention is without merit.

On June 2, 1982, an application for a wiretap order was made to the district court. Accompanying the application was a 60-page affidavit prepared by FBI agent Donald Sanchez containing 239 separate paragraphs. Sanchez's affidavit stated that the investigation conducted theretofore had revealed the existence of a large cocaine distribution conspiracy with membership consisting of six named individuals, including Webster, and Caperton. Sanchez described incidents of drug trafficking indicating that the data was compiled from discussions with several named informants and a confidential source, physical surveillance,

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[7]Section 2518 (1)(c) provides:

> (1) Each application for an order authorizing or approving the interception of a wire or oral communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
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> * * *
>
> (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;
>
> * * *

investigation of telephone records and a pen register. These sources demonstrated the frequent use of the telephone for drug trafficking purposes. In a subsequent portion of the affidavit, Sanchez set forth reasons why electronic surveillance was needed. He stated that physical surveillance had not disclosed Webster's source for cocaine and that there was no reason to believe that future physical surveillance would be successful. He added that continued surveillance carried a serious risk of detection that would irreparably damage the ongoing investigation. The agent also stated that infiltration was not a viable option because Webster was suspicious of newcomers and because the informants "cannot and will not" introduce an undercover agent to Webster.

Nonetheless, Webster contends, as he did prior to trial, that the lengthy affidavit failed to satisfy 18 U.S.C. § 2518 (1)(c), which requires that wiretap affidavits contain a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried.[8] However, the purpose of § 2518 (1)(c) is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted. Rather, the section is designed to inform the issuing judge of the difficulties involved in the use of conventional techniques and to insure that wiretapping is not resorted to in a situation in which traditional investigative techniques will suffice to expose crime. *See*, United States v. Kahn, 415 U.S. 143, 153 (1974); United States v. Clements, 588 F.2d 1030, 1036 (5th Cir.), *cert. denied*, 440 U.S. 982 (1979). Moreover, this Court, in the past, has affirmed wiretapping orders based upon affidavits containing statements similar to those contained in Agent Sanchez' affidavit: inability to develop the case fully with an informant's knowledge, limited value of searches, inability to infiltrate, lack of access to the

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[8]*See*, note 7, *supra*.

source, fear expressed by informants and the like. *See, e.g.*, U.S. v. Hyde, 574 F.2d at 869. Judged by these well settled standards, Agent Sanchez' affidavit clearly satisfies the requirements of 18 U.S.C. § 2518 (1)(c). Finally, we note that the fact that Webster's counsel on appeal could list conceivable alternative techniques for investigation, (i.e., aerial surveillance) is not dispositive. As this Court has stated: "Courts will not invalidate a wiretap order because defense lawyers are able to suggest *post factum* some investigative technique that might have been used and was not. It is enough that the affidavit explains the...failure of several investigative techniques that reasonably suggest themselves." *Id.* at 867.

IV. The Search Warrant

Appellants Webster and Caperton maintain that the trial court erred in overruling their motion to suppress the evidence obtained pursuant to the search warrant. We disagree. Based on affidavits establishing probable cause that Webster's residence contained evidence of violations of numerous drug offenses, the magistrate issued a warrant authorizing a search of Webster's residence. The following items were included in the authorization: money, financial instruments, his and her matching gold Rolex watches, gold and diamond rings, controlled substances, drug paraphernalia, indicia of occupancy and residency, and three particularly described vehicles.

Appellant Webster alleges that the warrant is invalid since the language in it is too general and that, consequently, law enforcement officers had been empowered to rummage through his house. Webster's claim is without merit. This Court has recognized that detailed particularization often is impossible. We have held that in such instances, generic language suffices if it particularizes the types of items to be seized. *See*, United States v. Cool, 657 F.2d 730 (5thCir. 1981). Thus, it has been held that a warrant that authorizes the seizure of "paraphernalia" or "other fruits,

instrumentalities in evidence of a crime at this time unknown" was sufficient. Andersen v. Maryland, 427 U.S. 463, 479 (1976). In the instant case, the language in the warrant was sufficiently specific to avoid a general ransacking of Webster's house and a review of the record reveals that the warrant was adhered to in the search of Webster's house. Hence, this contention is rejected.

Prior to trial, appellant Caperton filed a motion to suppress the search warrant alleging different reasons. Caperton alleged the information in the affidavit was stale, that the affiant had set forth conclusory allegations without supporting facts, that no factual basis was shown for identifying Caperton as a party to certain incriminating telephone calls, and that the affiant had not explained why the agents had concluded that certain words spoken on the telephone were code words for drug transactions. Following an extensive hearing, the district court denied Caperton's motion to suppress and we affirm the district court's ruling in that regard.

Caperton's claim of stale information is without merit. Staleness is to be determined on the facts of each case. *See* United States v. Freeman, 685 F.2d 942 (5th Cir. 1982). No mechanical counting of the time between the events alleged in the affidavit and the time the warrant is issued will be made. Moreover, a finding of staleness or timeliness of information can depend upon the nature of the unlawful activity and, when the information of the affidavit clearly shows a long-standing, ongoing pattern of criminal activity, even if fairly long periods of time have lapsed between the information and the issuance of the warrant, the information need not be regarded as stale. *See* United States v. Freeman, 685 F.2d 942, 951-52 (5th Cir. 1982). Judged by these principles, the warrant issued to search Caperton's house was not based upon stale information. To the contrary, the 77-page affidavit was more than adequate as the detailed information received from eye witnesses, electronic surveillance and visual surveillance implicated

Caperton in an ongoing drug trafficking scheme beginning in May 1981 and continuing until July 22, 1982, only about two weeks before the warrant was issued.

Caperton also assails the propriety of the affiant's interpretation of certain key words, *e.g.*, "golf balls" overheard in telephone conversations as code words for drugs. However, the affidavit demonstrates that the affiant had participated in more than 300 drug investigations – fifty in an undercover capacity – during a span of seven years and had testified as an expert on the jargon used by drug traffickers on more than fifteen occasions. Clearly, the magistrate had more that ample reason to credit the affiant's interpretation of what the affiant believed to be coded language. Finally, we note that Caperton's remaining attacks upon the search warrant are without merit.

V. Bode's Motion for a Continuance

Appellant Bode contends that the trial court abused its discretion in denying his motion for continuance and, indeed, the record reflects that Bode's attorney had little time to prepare for trial. Appellant Bode was not indicted with the other codefendants in the original indictment. Instead, Bode was indicted on December 2, 1982, arraigned on December 3, 1982, and advised at that time that he should be prepared to proceed to trial on January 5, 1983.

Following a pretrial conference on January 4, 1983, counsel for appellant Bode made a motion for a continuance to which the trial court responded:

> As to [the] limited [time] that you – of course, you've been given – requires thirty days. I am disturbed and if you were alone I'd have no problem in granting a continuance. It's an unfortunate situation that you were not brought in before the late date.

It is well settled that the decision whether to grant a continuance lies within the sound discretion of the trial

court and that that decision will be overturned only if the appellant demonstrates an abuse of discretion resulting in serious prejudice. *See*, United States v. Jiminez-Diaz, 659 F.2d 562, 567 (5th Cir. 1981), *cert. denied sub nom*, Salazar v. United States, 456 U.S. 907 (1982). Moreover, when claims of insufficient time for preparation are advanced, this Court will examine the totality of the circumstances, including such factors as the time available for preparation, the degree of complexity of the case, the availability of discovery from the prosecution, the adequacy of the defense actually provided at trial, and the services performed by counsel for codefendants that accrued to the benefit of the defendant. *See*, United States v. Uptain, 531 F.2d 1281 (5th Cir. 1976).

The record reveals that the district court was sensitive to the limited amount of time given Bode's attorney for preparation. An examination of the record fails to reveal that the short amount of time given Bode resulted in serious prejudice to him. Bode's counsel had the full cooperation of the other defense lawyers as well as the prosecution. Indeed, counsel for Bode praised the prosecution for its openness in relaying discovery matters to Bode. Finally, we note that a review of the record reveals that Bode's counsel was fully prepared and effectively represented his client. Hence, we are unable to conclude that the trial court abused its discretion in denying Bode's motion for a continuance and that the court's decision resulted in serious prejudice to Bode's defense.

Finally, it is noted that we have fully considered the remaining contentions made by the appellants and have determined that they are without merit. Accordingly, finding no reversible error in the district court's judgment, it is affirmed in all respects.

AFFIRMED.

ORDER
DENYING REHEARING
(Filed Jul. 18, 1984)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-1191

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN RUSSELL WEBSTER, JR.,
DELBERT PAUL HOSKINS, ROBERT BODE
and JOHN JAY CAPERTON,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Texas

ON PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC (Opinion June 11, 1984, 5 Cir., 198__, _____ F.2d ____)
(July 18, 1984)

Before JOHNSON, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:

(✓) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Sam Johnson
United States Circuit Judge
7-16-84

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.